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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 660.

NATIONAL MANUFACTURING COMPANY ET AL.; GREAT WESTERN PAINT MANUFACTURING CORPORATION; MID-CENTRAL FISH COMPANY; WESTERN MERCANTILE COMPANY; COUCH TRACTOR and EQUIPMENT COMPANY; and CHARLES P. SHIPLEY SADDLERY & MERCANTILE CO., *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cases on February 8, 1954.

OPINIONS BELOW.

The two memorandum opinions of the District Court written in these cases were in *Western Mercantile Co.* v. *United States,* 111 F. Supp. 799 and in *Mid-Central Fish Co.* v. *United States,* 112 F. Supp. 792. The opinion of the Court of Appeals (R.N. 21)[1] has not been assigned a Federal Reporter number at this writing.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 8, 1954 (R.N. 52). The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Under the Federal Tort Claims Act (Appendix):

1. Is the Government immune from liability for the negligence of the menial servants of the Weather Bureau's River Forecasters and of the U. S. Engineers?

2. Is there an absolute policy of non-liability in the gathering or dissemination of public information?

3. Does the 1928 Mississippi River Flood Control Act[2] (Appendix, pp. 20-21) bar an action for damages in which

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[1] A separate record is included for the Shipley Saddlery & Mercantile Co. Case in order to show that complaint and the motion for rehearing, which was overruled by the Court of Appeals. References to the National Manufacturing Co. *et al.* record are designated R.N. followed by the page and the Shipley references are to R.S. followed by the page.

[2] 33 U. S. C., Section 702(c), 45 Stat. 534, printed in the Appendix hereto.

negligence of servants of the Government acts as a present, contributing, proximate cause, co-mingling with flood waters to produce damage?

4. Where the complaint under the Federal Tort Claims Act alleges the negligence of menial servants of the Government,

(a) in failing in their departmental duty to assemble and disseminate information concerning the then-existing stage of the Kansas River, and

(b) in negligently disseminating misinformation and assurances of safety regarding the maximum crest of the Kansas River with the water already on the ground,

does the complaint fail to state a claim within the coverage and outside of the exceptions of the Act?

STATUTES INVOLVED.

The pertinent statutory provisions, including those making up the Federal Tort Claims Act, are printed in an Appendix hereto, pp. 19-21.

STATEMENT.

These cases arise from dismissals of petitioners' claims under the Federal Tort Claims Act (Appendix) charging that the employees of named departments of the government negligently collected and assembled information and negligently disseminated misinformation and assurances of safety regarding the stage, condition, and flow of the Kansas River immediately prior to the Kansas City flood of July 13, 1951, trapping the petitioners' portable goods, which otherwise would have been removed to places of safety.

The Court of Appeals for the Eighth Circuit affirmed the summary judgments for respondent, United States of America, on February 8, 1954 (R.N. 52).

The complaints of the first five named petitioners follow the allegations of the National Manufacturing Company complaint. For this reason, it was stipulated by the parties that the record printed in Case No. 14,875 in the Court of Appeals could be used as accurately representing the record in all five of these cases.

A sixth case (Shipley) was presented to the Court below in a separate appeal, No. 14,894. The opinion of the Court of Appeals covers that case as well as those heretofore consolidated with the National Case (R.N. 21). It is therefore included in this joint petition.

The typical complaint (R.N. 2) under the Federal Tort Claims Act alleged negligence on the part of the officers and employees of the defendant in negligently collecting and assembling information and in disseminating misinformation and assurances of safety regarding flood conditions existing immediately prior to the Kansas City flood of July 13, 1951, and alleged that such negligent acts were committed by the defendant's officers and employees who were, under the circumstances, under a duty to accurately report to plaintiffs and all others the likelihood, danger, and imminence of the overflowing and flooding of the Kansas River basin at Kansas City (R.N. 26-27).

It was alleged that the petitioners were each damaged by reason of the negligence of the respondent's officers, agents, and employees in sums which total over One Million Dollars in the cases consolidated in the National Manufacturing Co. Record.

The Shipley complaint (R.S. 2) alleged negligent collection but omitted reference to negligent assurances of safety. The complaint states (R.S. 4) that the "defendant knew of the danger of flood at least twenty hours before such flood actually occurred but negligently failed to warn the plaintiff of such fact."

A great number of other cases[3] are on file in the District Court, but they are being held in abeyance pending the decision in the cases now on appeal before this Court.

The respondent filed motions in the District Court for summary judgment (R.N. 1) in each of the cases.

No testimony was taken, but defendant asserted that, regardless of the uncontroverted facts in plaintiffs' complaints, showing the negligence of the defendant, nevertheless, defendant was entitled to a summary judgment and dismissal of plaintiffs' cases, as a matter of law.

The District Court sustained respondent's motions for summary judgment and dismissed the cases, and these judgments were affirmed in the Court of Appeals (R.N. 52).

The cases now come to this Court on due and timely application for a writ of certiorari.

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[3]A total of 146 cases are on file in the Western District of Missouri. The total number of claims unfiled and filed in other jurisdictions is unknown.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the recovery in these actions is barred by Section 3 of the Mississippi Flood Control Act of May 15, 1928. (Appendix, pp. 20-21).

2. In holding that there is an absolute policy of non-liability in the gathering or dissemination of public information.

3. In holding that petitioners' claims are barred by the provisions of the Tort Claims Act, 28 U. S. C. 1346 and 28 U. S. C. 2674 (Appendix), that the United States shall be liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

4. In holding that Section 2680(h) of the Tort Claims Act excepting the torts of misrepresentation, deceit, and certain other deliberate torts is applicable to these claims.

5. In holding that the so-called discretionary function exception of Section 2680(a) bars these claims.

6. In affirming the orders and judgments of the District Court.

REASONS FOR GRANTING THE WRIT.

1. Importance of the Issue.

The principles involved in the cases at bar are of far greater importance than even the far-reaching effect upon the many litigants and the great losses[4] involved in the particular cases. These cases involve fundamentally the limitation which the lower court has placed upon the responsibility of the government agents for negligence in cases where large numbers of claims result from the admittedly negligent actions of the government's *river stage* employees. Weather or rain forecasts or other acts of God are not involved.

The sections of the United States Code known as the Federal Tort Claims Act (Appendix) comprise as important Federal legislation as has been passed by the Congress in the last several decades. Supreme Court Rule 38(5) directs us to the importance of the function of the Supreme Court in reviewing those few decisions of the Courts of Appeals wherein important questions of Federal law have arisen, which have not been but should be settled by this Court.[5]

This Court has recognized the important and far-reaching effect of the Federal Tort Claims Act. In *Dalehite* v. *United States,* 346 U. S. 15, the Court pointed out that the Act was passed after nearly thirty years of congressional

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[4]$30,550,791 is the total dollar volume involved in the 146 cases now pending in the Western District of Missouri. Total amount of all claims is unknown.

[5]*United States* v. *Standard Oil Co. of California et al.,* 332 U. S. 301, 302, Note 2; *Dalehite* v. *United States,* 346 U. S. 15.

consideration of the policy of governmental immunity from tort liability.[6]

In the present cases, after long weeks of unusually heavy rainfall had saturated the Kaw Valley, there occurred three days of the most rain in the widest area ever recorded north of the 39th degree of latitude. This cloudburst was confined to the Kaw Valley. No rain fell in that valley for twenty-four hours before the dikes were over topped. Two hours before the catastrophe the head of the Engineers on advice of the Weather Bureau forecast a two foot margin of safety. The water went over by more than ten feet. Someone had blundered. More than one hundred thousand vehicles were caught in the torrent. Property damages were increased by hundreds of millions.

The Government very properly considers that flood forecasting is a major weapon in minimizing flood damages. Has the Congress ever shown that it thought it wise to disclaim responsibility for these forecasts? Should there not be an express caveat such as is required in the securities market if such had been their intent?

To dispose of these cases as being barred by a 1928 Act,[7] which had to do with flood control and whose lan-

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[6]Footnote 10 of the Dalehite Opinion, 346 U. S. 15, 25, reviews the long legislative history of this important Act.

[7]The Mississippi Flood Control Act, 33 U. S. C., Section 702(c), is set forth at the end of the Appendix hereto and this alleged bar to these actions is discussed at Pages 32 *et seq.* of the main opinion and at Page 48 of Judge Johnsen's opinion in the Court below. These petitioners regard this statute as not applicable and as having been repealed by implication in the passage of the momentous Federal Tort Claims legislation. This point is of tremendous importance to these litigants and to litigants to come in the future, for the Government will now raise the bar to every case in which floods contribute in any way, shape, or form as the instrumentality

guage was framed without consideration of the far-reaching effect of the subsequent tort claims legislation, can only serve to emphasize the process of subtle judicial erosion which is the greatest danger to the people's rights under a narrow consideration of a most important and wide-sweeping legislative change in fundamental government tort liability philosophy. This is made particularly clear when the thought behind the language of Judge Johnsen's opinion from the Court below is analyzed (R.N. 49-50):

> "I would hope that the emphasis made here of the absolute policy of non-liability in the gathering or dissemination of public information might serve to discourage any further attempts on the part of the bar to get the camel's nose into the tent in this general field. I confess that it is a little disturbing to me that it even should have been thought, as has been done in this case and in *Jones* v. *United States,* (2 Cir.) 207 F. 2d 563, that the individual citizen in a free state ought to have paternalistic protection from his Government against the need to exercise his own judgment on the things he may be told or not told by it, as a matter of purported information, and against

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of the damage. The error of the decision is reserved for the main brief because of the length of the analysis necessary.

The discussion of the question of proximate cause which was before the Court below in briefs and argument is the same question as was raised under the guise of "Act of God" in the Fifth Circuit case of *U. S.* v. *State Road Dept. of Florida,* 85 F. Supp. 489, 189 F. 2d 591, certiorari denied 342 U. S. 903. That case rightfully ruled that the negligence of Government agents rather than the "Act of God" was the proximate cause of the loss. Of course, the Court below ruled that it did not in these cases matter if the negligence of the Government employees was a contributing, proximate cause of the loss with the "Act of God" or flood waters. Petitioners respectfully submit that this position when examined at greater length and with support of other Federal and Missouri cases will be shown to be additional error.

his right to believe or disbelieve all or any of this, as he may see fit."

This appears to be judicial legislation.

To charge that citizens who seek redress from the judicial arm of their government for the errors, negligence, and omissions of menial servants in the executive branch of the government are fostering paternalism or socialism is the height of incongruity and partialism. Socialism and governmental paternalism have always been fostered by the idea that "The King (or state) can do no wrong"; the Tort Claims Act has on the other hand said, "Let the government's agents exercise the same standard of care imposed on private citizens, and if they do not, let their employer pay *damages* (not grants in aid or alms) for their misfeasance." Surely this Court should consider carefully the carte blanche acceptance of the government's denial of liability in cases involving such serious results. If not, the expression of Mr. Justice Jackson will gradually, if it has not already, become the standard of liability (or nonliability) in Federal Tort Claims Cases, to-wit:

> "Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.' "[8]

This is a clear case of importance wherein the very basis of the Act is jeopardized and in which the Supreme Court's supervision of the Federal Judiciary should be exercised to examine the lower court's statements of the law.

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[8]*Dalehite* v. *United States*, 346 U. S. 15, 60.

2. Conflict of Decisions and Error in Regard to the Tort Claims Act.

The decision of the Court below is based on an erroneous interpretation of the Tort Claims Act itself and is believed to conflict with the principles set forth in *both* the majority court opinion and the dissenting view in the Texas City disaster litigation, *Dalehite* v. *United States,* 346 U. S. 15. The decision also clearly conflicts with the decision of the Fourth Circuit Court of Appeals, extending the scope of the Tort Claims Act to similar acts of negligence in *Somerset Seafood Company* v. *United States,* 193 F. 2d 631, with the opinion from the Tenth Circuit in *United States* v. *Gray,* 199 F. 2d 239, and with the opinion from the Fifth Circuit in *Costley et al.* v. *United States,* 181 F. 2d 723.

(a) Conflict and error in regard to the discretionary function exception.

The Court of Appeals has declared that this action will not lie because the employees of the Weather Bureau who failed in their duty to inform the petitioners of the crest of the water were performing a discretionary or exempt function at the time (R.N. 46). The *Dalehite* v. *United States Case, supra,* spelled out the definition of "discretionary function" as that term was involved in the top executive level decisions therein made. In the cases at bar no decisions were pleaded or suggested to have been made at the executive level but negligence is pleaded in action at the ministerial level. The facts pleaded, and which petitioners are prepared to prove, are the converse of the fact situation involved in the *Dalehite Case, supra,*

and the Court of Appeals has neglected to give the facts pleaded any weight at all.[9]

Thus, the Court's opinion in the *Dalehite Case, supra,* gives the following guide to the so-called discretionary function exception of the Act (Sec. 2680(a), 28 U. S. C.), 346 U. S. 1. c. 35, 36:

> "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for *policy* judgment and decision there is discretion * * *" (Emphasis supplied).

This Court then further amplified the distinction between policy and plans and day-to-day operational jobs in the following footnote 32 from the *Dalehite Case,* 346 U. S. 15, 36:

> "32. The courts that have passed upon the application of Sec. 2680 (a) to suits under the Tort

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[9]It is axiomatic that on motion for summary judgment by the defendant, the plaintiff is entitled to the broadest interpretation of his allegations of negligence.

The facts here pleaded, and which would be amply supported and amplified by the evidence at trial, show that the responsible employees knew twenty hours before the flooding that the volume of water already on the ground upstream would necessarily flood the Central Industrial District of Kansas City, Mo. (R.S. 4). Yet, within two hours of the overtopping of the levees, responsible employees failed to give warning and on the contrary continued to reassure plaintiffs of a crest of thirty-three feet on the Kaw, with a two feet freeboard, when in fact the inevitable crest was forty-three and seven tenths feet. These are not cases of slight error or miscalculation!

Claims Act have interpreted the exception of discretionary functions, generally, in conformity with our holding that negligence in *policies or plans for authorized governmental activities* cannot support damage suits" (Emphasis supplied).

The dissenting opinion in *Dalehite* v. *United States, supra,* likewise stresses the meaning of the distinction which is necessary between "governmental" function and "discretionary" function, *i. e.* 346 U. S. l. c. 58, 59:

> "* * * The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly *by those in charge of detail.* We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.
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> * * * * * * *
>
> "The Government also relies on the body of law developed in the field of municipal liability for torts which deal with discretionary, as opposed to ministerial acts. Whatever the substantiality of this dichotomy, the cases which have interpreted it are in hopeless confusion; some have used 'discretionary' and 'ministerial' interchangeably with 'proprietary' and 'governmental,' while others have rather uncritically borrowed the same terminology from the law of mandamus. But even cases cited by the Government hold that, although the *municipality may not be held for its decision to undertake a project, it is liable for negligent execution or upkeep*" (Emphasis supplied).

The decision of the lower court is erroneous when it concludes (R.N. 46):

> "The forecasting or omission of forecasts by the Bureau is a 'discretionary function' excepted from the Act by Section 2680(a). *Dalehite* v. *United States, supra.*"

Throughout the brief and argument, the government attorneys in the Court below attempted to make "discretionary" and "governmental" function synonymous and pointed to the argument of the petition for rehearing in the *Dalehite Case* as raising the fear that even operational details of an act might be termed discretionary functions by reason of implications from the Dalehite opinion. Undoubtedly this Court denied a rehearing in the Dalehite case in the belief that other courts and lawyers in a careful reading of that opinion would see through such an attempt. The Court below has fallen heir to the confusion fostered by the weight of the office of the Attorney General of the United States in its artful advocacy of non-liability on the part of the government.

The conflict with the decision of this Court will become increasingly apparent when the decisions from other Circuits are analyzed to show the clear conflict therewith. These decisions will merely be mentioned briefly here in order to reserve the more thorough analysis of the conflict for resolution in the event the cases are heard in the brief on the merits. One of the most striking examples of the conflict is that with the opinion of *Somerset Seafood Co.* v. *United States,* (1951) 193 F. 2d 631. That case is very similar in its essential elements to the case at bar. There, the plaintiff sought damages from the United States for the loss of its boat which had been stranded on the wreck of the sunken vessel "The San Marcos" and alleged negligence on the part of the employees and agents of the United States in marking the wrecked San Marcos. The Court commented as to the defense of discretionary function as follows, l. c. 635:

> "In addition to this, we think that, even if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in

marking after the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such way as to constitute a trap for the ignorant or unwary rather than a warning of danger."

The other Courts of Appeals' opinions with which the decision below conflicts on the question of discretionary function are *United States* v. *Gray,* (10 Cir.) 199 F. 2d 239, and *Costley et al.* v. *United States,* (5 Cir.) 181 F. 2d 723.

(b) Error in regard to exception of misrepresentation and deceit, 28 U. S. C., 2680(h).

The fourth specification of error and the question relating to the exception from the Tort Claims Act of 28 U. S. C., Section 2680(h) relating to torts of misrepresentation and deceit and other deliberate torts will be reserved for the brief and argument if the application for certiorari is granted in order to limit the length of the argument in this petition. While this ground for the dismissal was included by only one of the three Circuit Judges below (R.N. 40), it is to petitioners' knowledge the first time that it has been claimed that this exception applies to purely tort and negligence actions as opposed to those actions for fraud, misrepresentation, and deceit which are founded in the field of contract law[10]. In fact, in another case of this kind of negligence involving the negligent failure to issue warning to airplanes using the same runway, this exception was not applied. *Union Trust Company of the District of Columbia* v. *United States,* (1953) 113 F. Supp. 80 (petitioners understand this case is now on appeal).

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[10]The very recent cases of *Jones* v. *United States,* 2 Cir., 207 F. 2d 563, and *United States* v. *Silverton,* 1 Cir., 200 F. 2d 824, cited by the Court below at pages 41 and 42 of the Record are contract misrepresentation cases.

(c) Conflict and error in regard to similarity to liability of a private citizen.

(R.N. 40 and R.N. 48) The separate concurring opinion by Judge Johnsen amplifies and condenses the point 3 of the opinion in chief (R.N. 40) at the Record page 48 when Judge Johnsen states: "The second ground is the equally absolute policy which has always existed in the common law that the dissemination or non-dissemination of public information, not of a personal character, is without any basis in tort in respect to its accuracy" (citing *no* cases). That point is raised as a bar because of the provisions of 28 U. S. C., Sections 2674 and 1346 (b), providing that the United States shall be liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place of the act or omission occurred."

Footnote 1 of the concurring opinion of Judge Johnsen (R.N. 48) intimates that indeed private contracts may impose liability in such situations as these.

The petitioners were and are prepared to show that there are a number of private, commercial firms furnishing weather service to subscribers in commerce and navigation (Western Union being one and Dr. Krick & Associates being another). Many airlines have private meteorological services. A hydrological engineering firm could be employed to give flood warnings in this same manner. Railroads have comparable facilities. Therefore, this Court is in error in ruling out the liability here under the Missouri law which governs these cases. The following cases, far from being irrelevant as held by the Court below (R.N. 46), form the basis of liability in the State of Missouri and

elsewhere for failure to warn or false warning after the assumption of the duty to warn has been undertaken.

Berry v. *Emery Bird Thayer*, 357 Mo. 808, 211 S. W. 2d 35.

Stumpf v. *Panhandle Eastern Pipe Line Co.*, 354 Mo. 808, 189 S. W. 2d 223.

Banks v. *Morris Co.*, 302 Mo. 254, 257 S. W. 482.

Ellington v. *Rock Island R. R. Co.*, 45 S. W. 2d 105.

Bachman v. *Railway*, 310 Mo. 48.

Brash v. *City of St. Louis*, 161 Mo. 437.

Ford v. *Wabash Ry. Co.*, 318 Mo. 723, 300 S. W. 769.

If it is indeed the law of our land that the Government is irresponsible in the gathering or dissemination of public information, then let this Court and no other proclaim it so that the people—through its Congress—may judge.

Under the decision below, civil servants enjoy a freedom to lag, to loaf, to lure to destruction. They may laze through a period demanding emergency action; they may make the grossest miscalculation; they may dawdle or blunder; they may fill the press and the air waves with unwarranted assurances of safety in time of peril, but "there is an absolute policy of non-liability in the gathering or dissemination of public information." Such, no doubt, is the rule in every state which must subsist upon the ignorance of the people. Such is the police state which recognizes no private individual rights. The American concept is expressed in the Tort Claims Act. If a civil servant is careless or incompetent to the damage of a citizen, let it be proved in open court; the people will make it good.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: March 26, 1954.

APPENDIX.

1. The pertinent provisions of the Federal Tort Claims Act, as now codified in 28 U. S. C.[1] provide:

Section 1346. United States as defendant.

* * * * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * * *

Section 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * * * *

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[1]The Federal Tort Claims Act (60 Stat. 842, 28 U. S. C. (1946 Ed.) 921 *et seq.*) was repealed and its provisions were revised and reenacted into law as 28 U. S. C. (Supp. V) 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948, 62 Stat. 869.

Section 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * * * * *

2. The statute relied on by respondent as a bar to these suits is 33 U. S. C., § 702, Mississippi River:

* * * * * * *

§ 702(c).

Except when authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of sections 702a, 702b-702d, 702e-702g, 702h-702j, 702k, 702l, 702m of this title shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned

over to them under the provisions of section 702d; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of sections 702a, 702b-702d, 702e-702g, 702h-702j, 702k, 702l, 702m of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.